Supreme Court of United States.

No. 235.

Appeal from the Circuit Court of the United States in Louisiana.

WARNER VAN NORDEN, APPELLANT.

versus

MORTON, BLISS & CO. APPELLEES.

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I.

THE PLEADINGS.

The appellant filed a bill in the Circuit Court, to enjoin proceedings commenced by the appellees, to obtain satisfaction of a judgment obtained by them in that Court, against the Mississippi and Mexican Gulf Ship Canal Company, by the levy of an execution upon the dredge-boat No. 3.

The bill states, that the defendant in that execution sold and delivered to him the dredge-boat No. 3, with derrick and appurtenances for a full consideration, on the 22nd November, 1872, and that he thereupon obtained possession, and retained it until this levy was

made. The conveyance is on p. 12, fo. 37–8. He charges that the appellants had long afterwards obtained their judgment, and had but lately caused the seizure to be made of that property, and there was danger of a sale by the marshal.

He denies the liability of the property to be sold upon the execution, because of his ownership, and prays that there be an injunction upon the marshal, requiring the appellees and marshal to desist from seizing, holding or interfering with the same, and that they be decreed to pay five thousand dollars, of damages.

The defendants answered the bill, admitting they had taken the proceedings to have their debt collected by a sale of the property, and averred, that on the 8th May, 1872, the Canal Company, their debtor, had conveyed to them in pledge the dredge-boat No. 3, to secure the debt for which the judgment was rendered. That this was known to the plaintiff, and that when he acquired possession of the property in November, 1872, there was a distinct promise and agreement on his part, that he would hold the property subject to the pledge which the appellees at that time had.

Record 4, 5 and 6.

The appellant filed a replication in which there was a denial of the answer, repeating what was said in the bill, and assailing the title made to the appellees by the Canal Company.

II.

THE TESTIMONY.

The appellees produced a conveyance dated 8th May, 1872, by which the dredge-boat was hypothecated to them to secure the payment of acceptances the appellees were to make of the drafts drawn by the Canal Company, at its request and for its accommodation as set forth in the answer and the exhibit.

Record, p. 5 to 6. This pledge was made by the treasurer, under a resolution of the board of directors, dated 2d March, 1872, and found on p. 49 of the record. Its date is shown by reference to the second paragraph on p. 43, of the record. The judgment of the defendants in this cause against the Ship Canal Company is at page 48.

The case of the appellant commences at a date subsequent to the execution of this act of pledge to the defendants.

The first agreement with him bears date the 18th May, 1872. Record, pp. 49, 50, 51. By this agreement Van Norden contracts to make advances in large sums to the Canal Company, and provides for securities to be given to him. The 10th article of this agreement provides, that whenever Van Norden shall request the dredge-boats Nos. *one*, *two* and *four*, and the Metairie Ridge boat with the three derricks accompanying and working with the same, shall be transferred by the Ship Canal Company "as additional security for the money to be advanced by him." Record pp. 51, 57.

The dredge-boat No. 3, which had been pledged to the defendants on the 8th of May, 1872, was not included in this contract.

The drafts drawn on Morton, Bliss & Co. amounted to seventy-one thousand dollars, and on these drafts there remains a balance due, they were all payable prior to the 22nd November, 1872, and judgment represents the debt.

In November 1872, the appellant, Van Norden, procured from the Ship Canal Company, a cession of property described in a certificate of that date found in the record at page 46. The recital in that certificate is, that there was a debt for the company to Van Norden, which was due; that the company had contracted to transfer and deliver to him "*all* and *sundry*, the *dredge-boats*, derricks, etc., now belonging to this company." Therefore, *in good faith*, and pursuant to contract previously passed between Van Norden and the company, the president and secretary were directed to sell and transfer to him by notarial act for fifty thousand dollars all the dredge-boats belonging to the company, with all their appurtenances.

Dredge-boats one, two, THREE, four with others are included in this act.

On the same day the company made an agreement with him to prosecute the work contemplated by the act, (Record 47), and to receive all the advantages which the legislative acts afford.

This exposition of the papers shows that Van Norden did not have any claim to the dredge-boat *No. 3*, described in the bill until this act of November, 1872. That the recital in the contract of transfer, that his debt was created upon a promise of any transfer of the dredge-boat No. 3, the boat now claimed by him is entirely untrue. It is not credible that he did not know in November, 1872, of the contract with Morton, Bliss & Co. in May, and the recitals betray the purpose of Van Norden and his supporters in the board of directors of the Canal Company to defraud that firm.

The material issue in the cause is as to what took place at the meeting in November, 1872, when the resolution to make the conveyance at that date to Van Norden, was adopted.

Did Van Norden know of the conveyance to Morton, Bliss & Co., and did he consent to hold this boat in subordination to that agreement?

The treasurer of the company at the time was Cyrus Bussey. Record, pp. 27, 54.

He was present when Van Norden submitted the resolution to the meeting, composed of a portion of the board. He objected to the transfer of the dredge-boat No. 3 to Van Norden.

He stated that it had been transferred in good faith to Morton, Bliss & Co., and that it would be wrong to incumber it.

The answer of Van Norden to this plain and truthful statement, is to the effect that the conveyance to him was a mere sham, and that simulation and fraud was the basis of every part.

His language, as reported, was the conveyance to him, was a mere matter of form, and that he would re-transfer the property back to the company as soon as he worked out the amount due to him. Bussey objected to the price; Van Norden stated that it mattered not what the price was fixed at, that it was a matter of form, etc. Van Norden, in the conversation, agreed to receive the transfer of the machinery subject to the claim of Morton, Bliss & Co. Bussey says he made a memorandum of the agreement at that time. He says, that except for this agreement to hold the property subject to the pledge, the transfer would not have been made to him. Record 28, fos. 90, 91, 95; Rec. 54, fo. 174; Rec. 55, fos. 175, 176, 177.

Folger, the president of the company, supports these statements of Bussey, and adopts for the most part his entire testimony. Rec. 57, fo. 183.

Van Norden and his superintendent Moody deny there was such an agreement, but the testimony of Van Norden is equivocal and evasive, and on the face of it seemingly designed to disguise his transaction with the company. Moody maintains the reputation of the State of Louisiana for the production and growth of swift witnesses.

POINTS AND AUTHORITIES.

The Court of Chancery had no jurisdiction of this suit; a plain and adequate remedy is provided in the Code of Practice.

This Code provides for the suspension of a sale of property in the custody of an officer having an execution, at the suit of a third person, not a party to the judgment or execution, but who claims to have an interest in it.

It is called an opposition by third persons. It is a demand brought by a third person not a party to the suit, to arrest the execution of an order of seizure or judgment in the suit, or to regulate the effect of such a seizure.

It is made when a person claims to be the owner of the thing seized, or that he has a privilege on the thing seized. It must be prosecuted in the *same* Court in which granted the order or rendered the judgment. If the third opponent claims the property as his own, he should file a petition and have service, and may stay the sale by giving a bond as set forth in the Code of Practice.

Revised Code of Practice, Ch III, § V, p. 117, Arts. 395 to 403.

2 Hennen's Dig., p. 1182.

A Court of Chancery will not hinder a sheriff or marshall from selling personal property levied upon by him, at the suit of a claimant of the property. Bouldin vs. Alexander, 7 Mon. 424.

The paper contained on page forty-five of the record, is a vertual transfer to Van Norden of the business of the corporation, and substitutes him to all of the advantages proposed in it. Bussey assented to this, but upon the conditions we have already set forth.

IV.

The pleading in this case raise questions as to the validity of the claim of the appellant, as being in fraud of the creditors of the company, and as beyond the powers of the corporation, and there are pleas of prescription to answer these.

These questions are of no importance in view of the important questions already considered. We insist that the appellant received the property subject to the right of the appellees; that he is a bailee holding for them and in subordination to them, and that the appellees have a clear right to enforee their claim through the writ of execution of the Circuit Court upon the judgment they have obtained.

J. A. CAMPBELL,
Attorney for Defendants.